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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. ——

MICHELE MARCHESE and JESSE DEL BONO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In reply to the Memorandum for the United States in Opposition, we shall consider and answer statements made therein by respondent, United States, in the order in which such statements appear.

1. Respondent first declares that petitioners assert no claims in this petition which were not urged upon this Court in prior petitions for certiorari, and cites the case of *Lopez v. United States*, 373 U.S. 427, as controlling. Respondent can get no comfort from the *Lopez* decision since, although the hidden transmitter did not work in that instance, from the language of Mr. Justice Warren in his concurring opinion and the language of Justices Brennan, Harlan, Douglas and Goldberg, a distinction was made between the use of a hidden transmitter and a hidden recorder wherein the tape recording might, under restricted circumstances, be used solely for corroboration. All five of said Justices declared by dicta that

the use of the hidden transmitter was proscribed by the Fourth and Fifth Amendments.

Respondent overlooks the fact that on the first petition for certiorari, following the judgment of dismissal by the United States District Court of Marchese's petition for writ of habeas corpus, which dismissal was affirmed by the Circuit Court, this Court reversed such judgment and remanded the case to the District Court for reconsideration. This reversal and remand followed closely upon the heels of the *Lopez* decision.

2. Respondent states that Judge Clarke, after a hearing on September 30, 1963, *without stating the basis of his ruling,* reduced the sentence of Marchese to five years and, upon the basis that he had served four years and seven months with good behavior, ordered his immediate release and did the same with Del Bono later. That statement, as shown by the record, is incorrect. Judge Clarke intended to discharge petitioners absolutely on the basis stated by him, namely, that their constitutional rights had been violated in three respects: (1) by the use of the hidden transmitter proscribed at least by this Court in the dicta of the *Lopez* case, *supra*; (2) the committing of perjury by Federal Agent Malcolm Richards; and (3) the knowing permitting of the said perjurious testimony to be used at the trial and the failure of the Assistant United States Attorney to disclose the facts with respect thereto to the trial court.

The Court of Appeals for the Ninth Circuit, disregarding the rules of appellate review – even those repeatedly enunciated by it, held that the evidence was insufficient to support the findings of facts with respect to Nos. (2) and (3) *supra.* The Court did not deny that there was a hidden transmitter used by respondent, but avoided a direct ruling in connection therewith by stating that this issue had previously been urged and passed upon. This ruling was in direct conflict with

the previous reversal and remand of the case by this Court (474 U.S. 101), as well as with *Sanders v. United States,* 373 U.S. 1. Even if grounds (2) and (3) were ruled by the Circuit Court as not supporting the contention of petitioners that their constitutional rights were violated, the findings of fact, conclusions of law and judgment that petitioners' rights were violated by the use of the hidden transmitter should have been upheld, because there has never been the slightest denial by respondent that a hidden transmitter was used.

Judge Clarke intended to discharge petitioners from custody and to further support his intention, he reduced petitioners' sentences to five years and in addition discharged them for time served. The Circuit Court erroneously ruled that he exceeded his jurisdiction in so doing, both in purporting to reduce sentence under Rule 35 of Federal Rules of Criminal Procedure more than sixty days after imposition of sentence or after final review of the judgment, and in purporting to act administratively to make allowance for "good time."

The Circuit Court was clearly in error in declaring that Judge Clarke was purporting to reduce sentence under Rule 35. Said rule permits the trial judge, within said period, to reduce sentence imposed at his discretion in every case whether the judgment is subject to collateral attack or not. Judge Clarke was not proceeding under said rule, but was proceeding in accordance with the powers expressly conferred upon him by Title 28 Sec. 2243 U.S.C. (habeas corpus) wherein the District Court may "dispose of the matter as law and justice require," when the judgment is subject to collateral attack by reason of infringement of petitioners' constitutional rights. The same powers exist by implication under the motion procedure, Title 28 Sec. 2255 U.S.C., which is "the substantial equivalent of federal habeas corpus." *Sanders v.*

United States, supra, 373 U.S. 1, 15. Judge Clarke was, therefore, acting independently of Rule 35, and not under the same.

The Circuit Court also erroneously held that Judge Clarke purported to act administratively in making allowances for "good time." It disregarded the fact that petitioners had already earned "good time" under the provisions of Title 18 Sections 4161 and 4163, which provide for such good time automatically if the prisoner has a good prison record. The evidence showed that the prison authorities had already considered that the prison record of petitioners was good. A letter from the prison authorities to Judge Clarke, prior to the hearing, quoted in Note 2 of the petition for certiorari (p. 19), established that Marchese not only had a clear conduct prison record but an outstanding one. Judge Clarke was, therefore, only finding what had already existed, and was not acting administratively. He could thus consider the "good time" record in doing what the "ends of justice require," and discharge petitioners for time served, especially since the good time credit to which petitioners were then entitled, when added to the time actually served by them, far exceeded a five-year sentence.

However, independently of the reduction in sentence which Judge Clarke ordered, he had the jurisdiction and power to discharge petitioners absolutely, or for time served. The words "for time served" should have been disregarded as surplusage by the Circuit Court if it disagreed with the case of *Powell v. Wiman,* 287 F. 2d 275, and the case of *McKenna v. Ellis,* 280 F. 2d 593, wherein the Court discharged petitioners from custody "for time served" in the ends of justice.

The discretion was also conferred upon Judge Clarke by this Court's decison (374 U.S. 101), wherein it reversed and remanded the instant case to the District Court for reconsider-

ation in the light of *Sanders v. United States, supra.*

Judge Clarke thereupon did reconsider and, upon such reconsideration after hearing, granted the petitions and motions of Marchese and Del Bono and discharged them. In reversing his order, the Circuit Court, without asserting there was any abuse of discretion on his part, exceeded its jurisdiction. We submit that his discretion, as exercised, was not subject to the jurisdiction and power of the Circuit Court to vacate and set aside the relief granted.

4. Finally, respondent contends that all questions in the present petition have previously been adjudicated and have been raised in prior petitions for certiorari, which were denied. Respondent is incorrect in such statement in several respects. In the first place, in the original appeal the Circuit Court never directly ruled on the use of the hidden transmitter but affirmed the judgment of conviction without opinion. Even though this Court denied certiorari, such denial did not import any passing upon the issues involved. It has been repeatedly held that denial of certiorari imports no expression of opinion on the merits of the case and carries no implication whatever regarding the merits of the case it has declined to review. *Maryland v. Baltimore,* 338 U.S. 912; *Sunal v. Large,* 332 U.S. 174.

In the second place, on the next appeal, which was from the order dismissing Marchese's petition for habeas corpus, the Circuit Court again avoided a direct ruling on any of the grounds of the violation of constitutional rights, and particularly avoided a direct ruling in connection with the use of the hidden transmitter. The Court supported the contention of respondent on that appeal, as in the present proceeding, that the questions had been raised and passed upon. However, this Court reversed the Circuit Court and remanded the case. We

submit that it would not have done so if it had not disagreed with such contentions and rulings and felt that petitioners' constitutional rights had in fact been violated. Its granting of certiorari is in an entirely different category from denial of certiorari, so far as an expression or non-expression of opinion on the merits of the case are concerned. The granting of certiorari directly expresses an opinion on the merits of the case, and in the instant case it was adverse to respondent.

In the third place, after Judge Clarke found that petitioners' constitutional rights had been violated, on appeal by the Government, the Circuit Court again by-passed and avoided a direct ruling on the hidden transmitter, using the same old basis as herein contended, that said question had previously been raised and litigated. In denying certiorari, the Supreme Court imported no expression or view on the merits of the question then raised. Thus, respondent cannot contend it was passed upon or decided by this Court.

When appeal was taken from the last hearing, wherein Judge Clarke ruled that the decision of the Circuit Court was ambiguous as to his power and jurisdiction to act further in the matter, especially since there had been no direct ruling as to the violation of constitutional rights through the use of the hidden transmitter, the Circuit Court, for the first time, made a direct ruling on that particular question. It ruled that under the case of *Osborn v. United States,* 385 U.S. 323, the hidden transmitter, as used in this case, was permissible, since it was used by and with the consent of one party, to make an accurate record thereof. This ruling was distinctly erroneous and contrary to the dicta and implication of *Lopez, supra,* wherein a distinction was made between the use of a hidden transmitter and a hidden recorder, where the tape recording was used under the most restricted conditions for corroboration

purposes only. The use of the transmitter was, in effect, proscribed by *Lopez*. Furthermore, in *Osborn* no transmitter was used, so that case was wholly inapposite and does not support in the slightest the decision of the Circuit Court. Such decision is also in conflict with the case of *Berger v. New York*, 388 U.S. 41.

CONCLUSION

We respectfully request this Honorable Court to pass upon and decide the following questions to settle important questions of law and resolve conflicts in various circuits:

1. Was not the use of thehidden electronic transmitter a violation of petitioners' constitutional rights, subjecting the judgment of conviction to collateral attack and justifying the relief granted?

2. Does not the District Court have the power and jurisdiction, either under habeas corpus or the motion procedure under Section 2255 of Title 28 U.S.C., to reduce a sentence of a petitioner, where his constitutional rights have been violated and the judgment is subject to collateral attack, regardless of when such reduction may be granted, separate from and independently of Rule 35 wherein a time limit is fixed?

3. Does not the District Court have the power and jurisdiction in the ends of justice to discharge a petitioner for time served, under either or both habeas corpus or the motion procedure, whenever the judgment of conviction is subject to collateral attack; or must the discharge be absolute, without reference to time served, as ruled by the Circuit Court herein.

4. Does the Circuit Court have the jurisdiction and power to vacate and set aside a judgment of the District Court

discharging a petitioner under habeas corpus or under Section 2255 where the District Court has exercised its discretion in so doing to "serve the ends of justice"?

We respectfully submit that the petition for certiorari should be granted, and that the orders and judgments of United States District Court Judge Thurmond Clarke discharging petitioners be affirmed, and the case remanded to the District Court, directing such orders and judgments of discharge be carried out.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on October 3 4 1967, I served the within REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (Marchese v. U.S.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
Washington, D.C. [3 copies]

Wm. M. Byrne, Jr.
United States Attorney
U. S. Courthouse
Los Angeles, California [3 copies]

Clerk, U. S. Court of Appeals
For the Ninth Circuit
P. O. Box 547
San Francisco, Calif. 94101 [1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3rd 1967, at ~~Los Angeles, California~~.

R. A. Stanley
Signature

Subscribed and sworn to before me
this day of October, 1967.

_____
Notary Public in and for the
State of California

Orig. + 40 copies lodged with the Supreme Court of the United States.